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Domestic Relations

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of the bigamous marriage.[26] In 1961 the statute was amended to include within the definition of a bigamist anyone who, having a living spouse, cohabits within the state with another spouse.[27] If the defendant in the above case has not left this state, but is still living with a second spouse, he is criminally liable.

Rape — Intoxication as a Defense

In *State v. French*[28] the defendant was convicted of rape. The court of appeals reversed because the trial court had instructed the jury that the defendant's incapacity to commit rape by reason of intoxication must be proved by the defendant by a preponderance of the evidence. The Ohio Supreme Court affirmed the conviction. The court held that, since there is a presumption that anyone over fourteen years has the capacity to commit rape, the defendant must affirmatively rebut it. The court pointed out the similarity between physical incapacity due to intoxication and mental incapacity due to insanity. Both must be proven by a preponderance of the evidence to be valid defenses.

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DOMESTIC RELATIONS

The past year was of average interest to the observer of domestic relations litigation. There were no major changes in doctrine, and the Ohio Supreme Court continued to be reluctant to accept many of the cases in this area, apparently for fear of becoming a glorified divorce court. There were a number of interesting court of appeals cases, but most reported opinions represent the application of established and often unsatisfactory doctrine to diverse factual patterns. As to the volume of cases, there were forty-nine reported cases during the period covered by this survey.[1] This is about average. In the six years of this writer's reporting on Ohio domestic relations law the number of reported cases has run from a low of forty in 1959 to a high of sixty-five in 1956. More than any other area, except possibly automobile accidents, the reported cases in domestic relations represent the visible portion of a very large iceberg. The best estimate is that approximately 30,000 domestic rela-

26. 33 Ohio Laws 33 (1953).
27. OHIO REV. CODE § 2905.43 (Supp. 1961).
28. 171 Ohio St. 501, 172 N.E.2d 613 (1961).

tions cases were heard by the Ohio courts during the year and even this case load does not include the numerous motions to modify or enforce alimony and custody decrees, many of which consume more of the court's time and efforts than the original divorce.

INTERSTATE ASPECTS

There were two cases which involved jurisdiction and choice of law where an Ohio court was asked to determine the rights of a child whose parents were residents of another state.

In *Howells v. Limbeck*[2] the illegitimate son of a deceased Florida resident sought to inherit land located in Ohio which belonged to the father. Under both Ohio and Florida law an illegitimate child cannot inherit from his father. In Florida, acknowledgement of paternity in writing is sufficient to legitimate, but such an acknowledgement is not enough in Ohio, where marriage is also required. In this case the father, while a resident of Florida, acknowledged paternity in writing. After the father's death, the son filed a declaratory judgment action in Florida and on the basis of the acknowledgement, the Florida court decreed that he was legitimate. The Ohio Supreme Court held that the right of a child to inherit Ohio land is determined by Ohio law, but his status as a child depends on the law of his parent's domicile. Specifically, where the basis for legitimation is an acknowledgement by the father, the legal effect of the acknowledgement is determined by the law of his domicile at the time of the act. The supreme court concluded that the Florida decree was entitled to full faith and credit and that the child could inherit. As Justice Taft's concurring opinion points out, the decision on choice of law was correct, and consistent with the *Restatement of Conflict of Laws*.[3] However, it is not correct to decide the case on the basis of recognition of the Florida decree. The Florida case was a declaratory judgment action, the Ohio claimants were not parties to it, and should not be bound by it.

The second case in this area upheld the jurisdiction of an Ohio juvenile court to determine custody of a child who lived with his aunt and uncle in Ohio.[4] At least one of the child's parents was a resident of Indiana, and an action for divorce was pending in an Indiana court. The decision was clearly consistent with the case of *Fore v. Toth*[5] where the

1. The cases covered by the survey are those reported in the North Eastern Reporter during the calendar year 1961, from 170 N.E.2d 309 to 178 N.E.2d 192.

2. 172 Ohio St. 297, 175 N.E.2d 517 (1961). See also discussion in *Conflict of Laws* section, p. 446 *supra*.

3. RETATEMENT (SECOND) CONFLICT OF LAWS §§ 137, 246 (1958).

4. *In re* Minton, 176 N.E.2d 252 (Ohio Ct. App. 1960).

5. 168 Ohio St. 363, 155 N.E.2d 194 (1958).

supreme court held that Ohio could place a child who was present in Ohio under guardianship, regardless of the domicile of the parents.

The *Schwartz* case[6] held that a divorce obtained by perjury in another state was subject to collateral attack in Ohio. The decision is questionable, as most of the cases cited in favor of non-recognition are cases where the fraud connected with the divorce related to lack of due process or fraud as to jurisdiction.

DIVORCE

Procedure

Legislatures have a rather bad habit of enacting statutes without spelling out, and apparently without even considering, the appropriate sanction which should be applied for violation of the statute. The so-called "mandatory divorce investigation statute" is a good example. The statute requires a social work investigation as part of every divorce case where there are children under fourteen.[7] It is clear from the wording of the statute that the investigation is mandatory. Past cases have held that if the statute is not complied with, the divorce can be upset on appeal. A recent decision holds that in a case of non-compliance the divorce would be upset even after the time for appeal had run. The court held that it had authority, and possibly that it was required, to vacate a divorce decree entered in a prior term of court where no investigation was held.[8] There was no indication in the opinion that either party had remarried after the defective divorce, but it is always a possibility. It would seem that labeling a second marriage bigamous is too harsh a penalty, especially where the defect in procedure was the fault of the court, rather than of the parties.

Grounds and Defenses

In *Ginn v. Ginn*,[9] a case of first impression, the court held that an attempt by one spouse to have the other spouse committed to a mental hospital is a ground for divorce, if the action was taken without probable cause. In this case the wife acted without medical advice, and when she had not seen her husband for over a month. The husband was released from the hospital as not mentally ill after three days. It is possible under the doctrine of this case, that the institution of commitment proceedings

6. Schwartz v. Schwartz, 113 Ohio App. 275, 173 N.E.2d 393 (1960). See also discussion in *Conflict of Laws* section, p. 445 *supra.*

7. OHIO REV. CODE § 3105.08.

8. Cobb v. Cobb, 174 N.E.2d 290 (Ohio Ct. App. 1959).

9. 175 N.E.2d 848 (Ohio Ct. App. 1960).

without probable cause would be a ground for divorce even if the patient is mentally ill in fact, and would benefit from hospitalization.

Alimony

In *Bentz v. Bentz*[10] the supreme court settled a question which has caused some difficulty in the lower courts — the relationship between temporary and permanent alimony. The wife was awarded a divorce and permanent alimony consisting of a lump sum payable in monthly installments. The husband appealed, and the court of appeals ordered him to pay a fixed sum for the expenses of the appeal, and also monthly alimony for her support pending the appeal.[11] After the trial court was affirmed, the husband attempted to offset the amounts paid as temporary alimony, but not the amounts paid for expenses, against the obligation to pay permanent alimony. The supreme court upheld the offset, pointing out that if a credit were not allowed, the wife would receive double support during the appeal, which would be unfair to the husband, as permanent alimony was fixed at the date of divorce on the basis of the wife's needs at that time.

Prior to 1951, if the husband divorced the wife for her misconduct, she was not entitled to alimony. In 1951 the alimony statute was amended so as to eliminate any reference to misconduct[12] and since then the courts have been free to award alimony to the guilty party. Some lower courts have continued to consider the fact of misconduct in determining the amount of alimony to be awarded. Until this year there have been no cases on the effect, if any, which misconduct should have on the award of alimony. In the *Esteb* case[13] the court awarded a divorce to the husband because of the wife's misconduct, and then allowed him alimony because of her fault. This was reversed by the court of appeals which held that misconduct, or "aggression" (the term used in the pre-1951 statute) may not be considered at all in the determination of alimony. The supreme court in reversing the court of appeals held that aggression was not a controlling factor, but could be considered by the trial court in the exercise of its equity jurisdiction, as a factor in the determination of alimony.[14]

10. 171 Ohio St. 535, 173 N.E.2d 129 (1961).

11. In the *Bentz* case the supreme court did not comment on the fact that the court of appeals ordered alimony pending appeal while the case was before the supreme court. In Roberts v. Roberts, 177 N.E.2d 287 (Ohio Ct. App. 1961), the court of appeals held that it had authority to order alimony pending appeal while the appeal was before it, but not while its decision was pending in the supreme court.

12. *Compare* OHIO REV. CODE § 3105.18 *with* OHIO GEN. CODE § 8003-19.

13. Esteb v. Esteb, 175 N.E.2d 750 (Ohio Ct. App. 1961).

14. Esteb v. Esteb, 173 Ohio St. 259 (1962).

HUSBAND AND WIFE

Duty of Support

Under Ohio law a husband is required to support his wife, even if they are living apart by mutual consent. One of the tools that the wife can use to enforce this obligation is the so-called "alimony only" action. There has been some confusion in the lower courts as to the effect of such a decree. The court should not adjudicate permanent alimony or a division of property, because the parties are still married and such a decree might be an obstacle to reconciliation. The decree is not quite equivalent to the "divorce from bed and board" or the "legal separation" authorized by statute in many states, but it is substantially similar because the time spent apart under such a decree cannot be counted as desertion for one year in a subsequent divorce action.[15] In a recent Ohio case the wife filed a divorce action and then amended her petition to ask for a legal separation.[16] The trial court found that she was entitled to a legal separation, but was not entitled to alimony (apparently on the ground that she had independent means). The court of appeals held that the phrase "legal separation" should be deleted from the judgment, and also pointed out that the denial of alimony might be misconstrued as absolving the husband from his duty of support. Accordingly, the decree should be amended so as to indicate:

(1) The wife is not now entitled to alimony.

(2) The trial court will retain jurisdiction of the case so that alimony can be granted in the future on a showing of changed circumstances.

(3) The decree should specifically provide that it does not relieve the husband of his obligation of support.

The last provision is important to the wife because it allows her to exercise other remedies to enforce support. She could pledge her husband's credit for necessities, or, if she were pregnant, file a criminal nonsupport action, without the necessity of first going back to court and asking for more alimony under the original decree.

Antenuptial Agreements

Under the Ohio statutes, an antenuptial contract is valid, but parties cannot alter their legal relationships while they are married.[17] There is one way by which legal relations can be changed during marriage, and this is the rescission of a valid antenuptial agreement. The Ohio law on

15. Condon v. Condon, 8 Ohio App. 189 (1917).
16. Cummings v. Cummings, 173 N.E.2d 159 (Ohio Ct. App. 1959).
17. OHIO REV. CODE §§ 3103.05-.06.

antenuptial agreements was thoroughly reviewed in a recent probate court opinion.[18] The parties to the marriage entered into an antenuptial agreement under which the husband promised to leave her $15,000 by will, each party waived all other rights in the other's estate, and on the death of the husband, his property should pass to his heirs as if he were unmarried. The husband died without a will and the wife claimed the estate as against the brother and sister of the husband. The court held:

(1) The widow's testimony that the contract was rescinded by mutual agreement was barred by the "dead man statute," Ohio Revised Code section 2317.03.

(2) Under Ohio Revised Code section 2131.03, the wife who tries to avoid an antenuptial agreement must act within six months after the appointment of an administrator. Contrary to some earlier cases, this special statute of limitations applies even though the basis of the attack is mutual rescission or fraud in the inducement.

(3) Although the contract provided that the husband would leave her $15,000 by will, and he died intestate, the court construed the contract as a promise to give her $15,000, either by will or by action of the probate court. Accordingly, the contract was substantially performed by the husband and the wife could not avoid it on the ground of breach of contract.

(4) The brother and sister of the deceased husband do not take as the heirs, but take as beneficiaries of a third party beneficiary contract. Yet, while they take by contract, they are not creditors of the estate but take as distributees through the decedent. As such, they do not rank with general creditors over distributees in case of insolvency, and do not have to file creditor's claims under the four month "non-claim" statute, Ohio Revised Code section 2117.06.

Alienation of Affections

There were two interesting alienation of affection cases, neither of which announced any new legal principles.[19] Both of these cases held that the plaintiffs' case should go to the jury, in spite of the fact that in each case there was some evidence that the spouses were already estranged before the erring husband took up with the "other woman." The cases are a good illustration of the strict Ohio rule that the defendant is liable if her acts combine with the acts of the wayward husband to encourage separation or discourage reconciliation. In other words, the "other

18. Cantor v. Cantor, 174 N.E.2d 304 (Ohio P. Ct. 1959).

19. Franklin v. Schreyer, 174 N.E.2d 132 (Ohio Ct. App. 1960); Wallen v. Gorman, 176 N.E.2d 262 (Ohio Ct. App. 1960).

woman" who associates with a married man before his divorce becomes final does so at her peril.

MARRIAGE

Grounds for Annulment and Divorce

Under the common-law of marriage, fraud, impotency, and bigamy are grounds for annulment. In Ohio they are also grounds for divorce. For many years the Ohio courts granted both annulments and divorces, depending on which relief the parties requested, or on the circumstances of the case. In 1952 the *Eggleston* case[20] held that where the parties to a bigamous marriage had lived together for a substantial period of time, had children, and where one party insisted on a divorce and the other asked for an annulment, the court was without jurisdiction to grant an annulment. The court stated that where the defect in the marriage is a ground for both divorce and annulment divorce is the exclusive remedy. Since this decision the lower courts have had a great deal of difficulty with the question, and none of these cases have gone to the supreme court which is the only court which can clear up the confusion. Some courts have taken the *Eggleston* dictum literally, and held that there can be no annulment for any of the three causes listed in the divorce statute. Other courts have held that the supreme court decision should be limited to its facts, and have held, (1) that annulment is proper where neither party insists on divorce, or (2) divorce is the exclusive remedy only where the parties have lived together for a substantial period of time. A few courts have solved the problem by simply ignoring the *Eggleston* decision.

There were two cases which raised the issue during the past year. The first was a court of appeals decision which apparently ignored the question. In *Schwartz v. Schwartz*[21] the wife sued for annulment on the ground of bigamy. The husband admitted the allegations of the wife's petition and did not object to an annulment. The court granted the annulment, stating that in Ohio either annulment or divorce is an appropriate remedy. The court also held, without specific discussion of the question, that the Ohio rule on choice of remedies (divorce or annulment) would apply to a marriage which took place in Pennsylvania. This decision was probably correct under accepted choice of law rules.

The *Abelt* case[22] held to the contrary. In this case the husband sued for annulment on the grounds of both duress and bigamy and the wife

20. Eggleston v. Eggleston, 156 Ohio St. 422, 103 N.E.2d 395 (1952).

21. 173 N.E.2d 393 (Ohio Ct. App. 1960). See also discussion in *Conflict of Laws* section, p. 445 *supra.*

22. Abelt v. Zeman, 173 N.E.2d 907 (Ohio C.P. 1961).

counter-claimed for divorce on the ground of bigamy. The court held that the duress issue should be tried first and if it were proved, an annulment should be granted. If it were not proved, the court should then try the wife's suit for divorce, and if bigamy were proved, it should grant a divorce rather than an annulment.[23] This last decision was made on the basis of the *Eggleston* case, even though the parties never cohabited.

Common-Law Marriage

Surprisingly, there was only one case on common-law marriage. The parties to a ceremonial marriage were divorced and the divorce decree incorporated a division of property. The husband died three weeks after the divorce without revoking a will which left everything to the wife. The court held that the divorce plus the property settlement amounted to revocation by act of law, and evidence that the parties continued to live together after the divorce was insufficient to establish a new common-law marriage.[24]

PARENT AND CHILD

Duty of Support

The case of *State v. Earich*[25] illustrates an effective remedy for non-support of a child. The court held that an unemployed father is liable for criminal non-support if he fails to apply for relief, or applies and then fails to use his best efforts to remain qualified for relief. In this case the defendant applied for county relief but failed to show up for a work relief program. Sentence was suspended as long as he kept up his work obligation to the county. Presumably, the same device could be used to compel a husband to support his wife under the criminal non-support statute.[26]

Parents are liable for the support of their minor children, but not their adult children. There is one exception to this rule. The statute on the support of patients in state mental hospitals provides that the spouse, par-

23. In a subsequent opinion, the court determined that there was no duress, and that the parties were under age at the time of the marriage, that there had been no cohabitation or ratification, and the parties were therefore entitled to an annulment. However, the court deferred granting the annulment until the paternity of a child born to the wife could be established, holding that if the husband were the father, a child custody and support order should be made part of the annulment decree. Abelt v. Zeman, 87 Ohio L. Abs. 600 (Ohio C.P. 1961).

24. Skorapa v. Skorapa, 177 N.E.2d 310 (Ohio P. Ct. 1961).

25. 176 N.E.2d 191 (Ohio Juv. Ct. 1961).

26. OHIO REV. CODE §§ 3113.01, .03.

ents, and children of the patient are liable to the state for his support. In last year's survey article the *Pizon* case was discussed.[27] The court of appeals held that the spouse was primarily liable, and the adult children and parents were secondarily liable. Accordingly, the children could not be sued for support until remedies against the spouse had been exhausted. This decision was reversed by the supreme court this year in an opinion which held that the statute created joint and several liability.[28] The supreme court decision has been codified in the new patient support law which was enacted last fall.[29]

Adoption

Under most circumstances, the consent of the parents is required for adoption. Under either the adoption law, or under the juvenile court law, this consent can be dispensed with if the parent has willfully neglected to support the child. As pointed out in previous survey articles, the lower courts are inclined to find neglect on rather flimsy evidence, and these cases are frequently reversed by the appellate courts which require that the neglect be intentional and substantial.[30] The *Peters* case[31] is a good illustration, and as might be expected, the probate court was reversed.

In the strict sense, the term "de facto adoption" is a misnomer. Adoption is purely statutory, the statute is in derogation of the common law, and the general rule is that all of the statutory procedures must be strictly complied with. Occasionally the courts will relax the rules, as where the child has lived with the adoptive parents for a substantial period and there was some colorable attempt to adopt, the child will be permitted to inherit from the adoptive parent. Another situation is where the adoptive parents try to justify their failure to support the child on the basis of a technical defect in the adoption. Although this second situation is really a case of estoppel, it is sometimes referred to as "de facto adoption." A court of appeals decision points out that the de facto adoption is limited to these two situations, and an informal adoption by a stepfather is not effective to relieve the natural father of his obligation to support the child.[32]

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27. See Ross, *Survey of Ohio Law — Domestic Relations*, 12 WEST. RES. L. REV. 513 (1961); State v. Pizon, 168 N.E.2d 631 (Ohio C.P. 1959), *aff'd*, Ohio Ct. App. (unreported).

28. State v. Pizon, 172 Ohio St. 352, 176 N.E.2d 595 (1961).

29. OHIO REV. CODE § 5121.06.

30. See Ross, *Survey of Ohio Law — Domestic Relations*, 9 WEST. RES. L. REV. 322 (1958).

31. *In re* Adoption of Peters, 177 N.E.2d 541 (Ohio Ct. App. 1961).

32. Logan v. Logan, 170 N.E.2d 922 (Ohio Ct. App. 1960).

Illegitimacy

There were seven reported cases on illegitimacy, which is not surprising, considering that there were 1,300 paternity cases filed during the year in one county alone.[33] Most of the cases represented problems which crop up almost every year. Thus there were two cases that held that a paternity action is essentially civil, in spite of the quasi-criminal procedure used, so the defendant can be compelled to testify.[34] There were also two cases which held that a determination of paternity in a paternity action is not a necessary prerequisite for a criminal action for non-support of an illegitimate child,[35] or for a civil action for support under the Uniform Support Act.[36] There was another case on the meaning of the ambiguous phrase in the paternity statute which states that the action can be brought by an unmarried woman.[37] One case has held that if the plaintiff is unmarried at the birth of the child the statute does not bar the action.[38] However, in *Beam v. Ray*[39] a court of appeals followed the weight of lower court authority and held that marriage after the birth and before filing the action is a bar.

Presumption of Legitimacy

One of the strongest presumptions known to the law is the presumption that the child of a married woman is the child of her husband. In both *Langel v. Langel*[40] and *Koch v. Miller*[41] the presumption was successfully rebutted. Prior to 1944 the courts held that the presumption of legitimacy could only be overcome where there was clear and convincing proof that it was impossible for the husband to have fathered the child.[42] In the case of *State ex. rel Walker v. Clark*[43] the supreme court modified the rule so that the presumption can be rebutted by clear and convincing evidence that there was in fact no sexual intercourse between husband and wife at the time of conception. The next logical step, which has not yet been taken, is to allow the presumption to be rebutted on clear and convincing evidence that the husband is not the father, even

33. See Taylor v. Mosley, 178 N.E.2d 55, 64 (Ohio Juv. Ct. 1961), which gives this figure for paternity cases in Cuyahoga County in 1961.

34. State v. Mooney, 171 N.E.2d 918 (Ohio Ct. App. 1961); Taylor v. Mosley, 178 N.E.2d 55 (Ohio Juv. Ct. 1961).

35. State v. Medley, 172 N.E.2d 143 (Ohio Ct. App. 1960).

36. *In re* Duncan, 172 N.E.2d 478 (Ohio Ct. App. 1961).

37. Beam v. Ray, 111 Ohio App. 341, 170 N.E.2d 844 (1960).

38. Kirkbride v. Eschbaugh, 147 N.E.2d 676 (Ohio Juv. Ct. 1957).

39. 111 Ohio App. 31, 170 N.E.2d 844 (1960).

40. 175 N.E.2d 312 (Ohio Ct. App. 1960).

41. 178 N.E.2d 186 (Ohio P. Ct. 1961).

42. Powell v. State *ex rel* Fowler, 84 Ohio St. 165, 95 N.E. 660 (1911).

43. 144 Ohio St. 305, 58 N.E.2d 773 (1944).